In the

Supreme Court of the United States

H. B. Johnson *et al.*,
Plaintiffs in Error,
vs.
E. E. Riddle,
Defendant in Error.

No. [redacted] 161.

Motion to Dismiss Writ of Error or Affirm Judgment of the Court Below for Want of Sufficient Federal Question.

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Sup. Ct. Rep. 384) the first paragraph of the syllabus is as follows:

> "A decree of the highest state court adverse to the asserted rights under the Federal homestead law to settle upon unsurveyed public land, notwithstanding the wrongful act or error of the surveyor in designating and meandering such land as a lake, and to remain in possession to the end that the acts essential to the acquisition of title may be performed, is reviewable under the Federal Judicial Code, Par. 237, by the Federal Supreme Court."

In *A. T. & S. F. R. R. Co.* v. *Robinson*, 233 U. S. 173 (34 Sup. Ct. Rep. 556) the first paragraph of the syllabus is as follows:

> "A decree of a state court denying to the defendant the benefit of a Federal statute, compliance with which was set up in the answer and supported by testimony tending to show the truth of the allegation thereof, is an adverse ruling on the Federal right which, under the Judicial Code, Par. 237 (36 Stat. at L. 1156, Chap. 231, U. S. Comp. Stat. Supp. 1911, p. 227) warrants bringing the case up to the Federal Supreme Court by writ of error."

Section 237 of the Judicial Code confers upon this court the right to review the decision of a state court.

> "* * * Where any title, right, privilege, or immunity is claimed under the Constitution, or any statute or treaty of, or Commis-

sion held or authority exercised under the U. S., and the decision is against the title, right, privilege or immunity especially set up or claimed, by either party * * *"

The foundation of our claim in this case is that under the Atoka Agreement we have a right to declare the tenant as a trustee of the title for us, while his entire claim is that under the Atoka Agreement he was given the right to repudiate his contract with us, to repudiate the relation of landlord and tenant, to hold possession wrongfully and hostile to us and thereby acquire title independent of us.

We respectfully submit that the case comes squarely within the statute and the decisions cited.

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Now comes the defendant in error, F. E. Riddle, and moves the court to dismiss the writ of error herein, or affirm the judgment of the court below, for want of sufficient federal question for the following reasons, to-wit:

First.

That the plaintiffs in error are estopped to claim that a federal question is involved in this action within the jurisdiction of this court, for the reason

that when this action was pending in the District Court of Grady County, in the State of Oklahoma, and long after they had filed their answer and cross petition, (Transcript, pages 56-93), they filed a petition in said court for the transfer of the cause to the United States Circuit Court for the Eastern District of Oklahoma (Transcript, pages 317-318). Said petition being accompanied by a good and sufficient bond and verified by affidavit as required by law, was granted, and the cause was transferred to said United State Circuit Court. The petition was filed on March 28, 1908, and on November 30, 1908, plaintiffs in error changed their minds, and took the position that there was no federal question in the case such as would justify the removal of the same to the United States Circuit Court, or the retention of the case in said court, and on said day induced the United State Circuit Court for the Eastern District of Oklahoma to make the following order, remanding said cause to the state court, to-wit (Transcript, pages 318-319):

"Now on this, the 30th day of November, 1908, came on to be heard at Chickasha, in open court, the motion and petition of the defendants herein to have the above entitled cause referred and transferred to the state court, and the court being well and sufficiently advised in the premises is of the opinion that said motion is well taken and should be granted, for the following reasons:

"The Court find after examining all of said pleadings in said cause that neither the original petition, amended or supplemental petition of plaintiff shows necessarily any construction of the act of Congress or any treaty or law of the United States involved in said cause, and that it appearing to the court from said pleadings that the main question involved in said cause at the

time the same was scheduled to the plaintiff in said cause, and that under the Act of Congress the only question was as to the ownership of said improvements the owner thereof being entitled to purchase said lot.

"It is therefore considered, ordered and adjudged by the court that said cause be and the same is hereby retransferred to the state court of the State of Oklahoma.

"Done in open court at Chickasha, this 30th day of November, 1908. RALPH E. CAMPBELL,

"Judge U. S. Circuit Court
Eastern District of Oklahoma."

ARGUMENT.

The plaintiffs in error are clearly estopped from claiming that the federal courts have jurisdiction to determine any question involved in the writ of error by their action in filing their motion in the United States Circuit Court for the Eastern District of Oklahoma to remand the case to the state court, and inducing the United States Circuit Court to hold that "after examining all the pleadings in the case" * * * they do not show, "necessarily, any Act of Congress or any treaty or law of the United States, and that it appearing to the court from such pleadings that the main question involved in said cause, under the Act of Congress, is as to the ownership of improvements situated upon the lot in question involved in said cause at the

time the same was scheduled to the plaintiff in said cause; and that under the Act of Congress the only question was as to the ownership of said improvements, the owner thereof being entitled to purchase the lot." (Trans., page 319.)

This order was made on the 30th day of November, 1908, while the answer and cross petition was filed in the old United States Court for the Southern Indian Territory, on August 20, 1907. (The answer and cross petition were before the United States Circuit Court when the order remanding the case was made.)

The plaintiffs in error thus elected to treat this case as one not involving a federal question, but as depending on the question of fact as to the ownership of the improvements, to be determined under the local law.

The United States Circuit Court rightfully held that on the face of the pleadings it did not appear that any construction of an Act of Congress, or treaty or law of the United States was involved in the case, but that it did appear that the main question involved was as to the ownership of the improvements on the lot in controversy, and that the only question so far as plaintiffs

in error were concerned was as to the ownership of the improvements.

Plaintiffs in error denied the jurisdiction of the United States Circuit Court, upon the ground that the cause did not necessarily involve a construction of any Act of Congress, or treaty or law of the United States, and that the main question involved in the cause was as to the ownership of the improvements. Having elected to deny the federal jurisdiction on this ground, and the ground being well taken, as shown by the pleadings in the case as well as by the decision of the Supreme Court of the State of Oklahoma and after having induced the Federal Court to refuse to entertain jurisdiction on the grounds enumerated, and caused the case to be remanded to the State Court, and there prosecuted to final judgment and on appeal to the Supreme Court of the State, and having lost on all their contentions, in both the trial court and the Supreme Court, it is too late now for plaintiff in error to shift their position and invoke federal jurisdiction. They elected their remedy when they induced the Federal Court to deny jurisdiction and to render judgment based on a finding that there was no federal question in the case. This judgment adjudicates the question of jurisdiction in

favor of the contention which plaintiffs in error then made in that court. It was a proper adjudication on the question of jurisdiction and is just as binding on the plaintiffs in error as any other adjudication of a court of competent jurisdiction. We submit that they ought not now to be permitted to take the opposite position and maintain their writ of error upon the ground that the case does involve a federal question. The prosecution, by them, of the writ of error from this court is inconsistent with their action in inducing the United States Circuit Court to hold that the case did not involve a federal question. It is equivalent to the assertion by them, as appears from the record in the case, that although while the case was pending in the United States Circuit Court they had the right to induce that court to hold that the case involved no federal question, they may now induce this court to take the contrary view and determine a federal question, which, at their instance, was solemnly adjudicated not to exist.

The rule with reference to taking inconsistent positions and the election of remedies is too familiar to require the citation of much authority, but we invite the court's attention to Volume 15, page 259, of Cyc., where it is said that any

decisive act of a party with knowledge of his rights and of the facts, determines his election in face of conflicting and inconsistent remedies, and that the prosecution of one remedial right to judgment or decree, whether the judgment or decree is for or against him, is a decisive act which constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial rights.

And again, at page 262, in speaking of the effect of election of remedies, the same author says:

> "An election once made, with knowledge of the facts, between co-existing remedial rights, which are inconsistent is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit or proceeding based upon remedial right inconsistent with that asserted by the election, or to the maintenance of the defense founded upon such inconsistent right."

Plaintiffs in error denied the existence of a federal question in the case, and induced the United States Circuit Court to so hold. The election thus made constitutes a bar to their present contention that the case involves a federal question.

Second.

This court is without jurisdiction to entertain the writ of error herein, because the decision of the case in the Supreme Court of the State of Oklahoma, in favor of the defendant in error, was not against any "title, right, privilege, or immunity claimed" by plaintiffs in error, under the "constitution, treaties, statutes, laws, commissions, or authority of the United States." But the decision of the Supreme Court of the State of Oklahoma was in favor of defendants in error and sustained his title because he was the owner of improvements upon the lot in controversy, and therefore entitled to purchase it under the laws of the United States and treaty with the Chickasaw and Choctaw Tribes of Indians, governing the sale of town lots belonging to said tribes of Indians, wherein it is provided that the town lots shall be laid out and appraised, and that "the owner of improvements on each lot shall have the right to buy one residence and one business lot at fifty percentum of the appraised value of such property."

ARGUMENT.

An inspection of the record discloses the fact that the decision in the Supreme Court of the State of Oklahoma, in favor of the defendant in error, was not against any title, right, privilege, or immunity claimed by the plaintiffs in error under the constitution, treaty, statutes, laws, commission, or authority of the United States. It was necessary for the courts to construe the Chickasaw and

Choctaw treaty, relating to the disposition of lots in townsites, in order to determine the title set up by defendant in error in this action, it being an ejectment suit and his title being denied by the plaintiffs in error. And it was claimed by them that the defendant in error had no right to purchase the lot under the provisions of the treaty, for the reason that defendant in error was not the owner of the improvements on the lot.

The treaty, after providing for the appointment of a Townsite Commission, the laying out and platting of townsites, and the appraisement of lots on which permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses were found, provided:

> "The owner of the improvements on each lot shall have the right to buy one residence lot and one business lot at fifty percentum of the appraised value of such improved property, and the remainder of such improved lots at sixty-two and one-half percentum of said market value, within sixty days from the date of notice served on him that such lot is for sale, and if he purchase the lot, he shall, within ten days from his purchase, pay into the treasury of the United States one-fourth of the purchase price and the balance in three equal annual installments, and when the entire sum is paid, shall be entitled to a patent for the same." (Act of Congress, June 28, 1898, 30 Stat. L. 495.)

The record discloses much controversy in the Land Department and in the Courts over the ownership of improvements on the lot, but the United States Indian Inspector, the Commissioner of Indian Affairs, the trial court and the Supreme Court all held that defendant in error was the owner of the improvements on the lot and therefore entitled to purchase the same; and the patent from the Chickasaw and Choctaw Tribes vested title in him, but the construction of the treaty quoted, in order to determine the title of the defendant in error, does not present a federal question upon which the plaintiffs in error may rely in this case. The decision of the Supreme Court was in favor of the title asserted by defendant in error, and thus involved no federal question within the meaning of section 237 of the present judicial code, which was approved March 3, 1911, wherein, among other things, it is provided:

> "A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had * * * where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, *and the decision is against* the title, right, privilege or immunity especially set up or

> claimed, * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

The decision of the Supreme Court, as just stated, being in favor of the title asserted by defendant in error, the construction of the treaty which was necessary to ascertain whether or not defendant in error had title, does not present a federal question which would be available to the plaintiffs in error in this court. This rule is well established by the decisions of this court.

In the case of *DeLamars' Nevada Gold Mining Company* v. *James Nesbitt*, 177 U. S. 523, L. Ed. Vol. 44, page 872, the plaintiff claimed title to a certain mining claim covering the same ground as that of one Davidson, the defendant. The action being to quiet plaintiff's title, the plaintiff alleged the facts showing his compliance with the laws of the United States and charging that the defendant also claimed the ground, by virtue of the location of a certain claim, called by him the "Sleeper Claim," but that such location was subsequent to the location of the plaintiff; and that the plaintiff had protested in the land office against the issuance of a patent to the defendant, and in an answer denied the ownership and possession of plaintiff, and alleged as a defense the invalidity

of plaintiff's claim, under which he acquired title. Trial was had in the state court, which resulted in a judgment in favor of the plaintiff, from which judgment an appeal was taken to the Supreme Court of the State of Nevada, where the judgment was affirmed, and a writ of error was procured from this court and this court dismissed the writ of error for want of jurisdiction. After stating somewhat in detail the history of the controversy, the court said:

> "From this summary of the proceedings and the findings of the court, it is clear that the defendant set up no right, title, privilege, or immunity under a statute of the United States, the decision of which was adverse to it in that particular. The mere fact that the mining company claimed title under a location made by Davidson, under the general mining laws of the United States (Rev. Stat. Sec. 2325), was not in itself sufficient to raise a federal question, since no dispute arose as to the legality of said location, except so far as it covered grounds previously located, or as to the construction of this section. We have repeatedly held that to sustain a writ of error from this court, something more must appear than that the parties claimed title under an Act of Congress. * * * There was undoubtedly a federal question raised in the case, but it was raised by the plaintiff Nesbitt, who based his right to recover upon the Acts of November 3, 1893, and July 18, 1894, suspending the forfeiture of mining claims for failure to do the required amount

of work. The decision of the court, however, *was in favor of and not against the right claimed under this statute;* and of this construction, the *plaintiff in error is in no position to take advantage, as it made no claim under this statute.*"

See also:

Lowery v. Silver City Gold & Silver Mining Co., 179 U. S. 198, 45 Law Ed. 152.

Iowa v. Rood, 187 N. S. 92, Law Ed. 47, p. 90.

Third.

The plaintiffs in error in the court below did not base their claim to the lot in controversy on the constitution or laws of the United States, or treaty with the Chickasaw and Choctaw tribes of Indians, independent of their ownership of improvements upon the lot; and the decision of the Supreme Court of the State of Oklahoma is based upon the determination of the question of fact, wherein it is held that they were never the owners of any improvements on the lot in controversy entitling them to purchase said lot. And this court is without jurisdiction to entertain the writ of error, for the reason that the determination of this question of fact against the plaintiffs in error did not involve the application or construction of the constitution or the laws or treaties of the United States, but merely involved the application of the local law in the consideration of the evidence offered on the issue as to whether or not the plaintiffs in error or the defendant in error owned the improvements upon the lot entitling the one or the other to purchase it under the provisions of the treaty.

ARGUMENT.

This being an ejectment suit, it was necessary for the defendant to recover on the strength of his own title, his title being disputed by the plaintiffs in error, upon the ground that defendant in error was not entitled to purchase the lot in controversy, because defendant in error did not own improvements on the lot, entitling him to purchase under the provisions of the Chickasaw and Choctaw Treaty.

The title of the defendant in error was sustained by the finding of the United States Indian Inspector, who heard the contest on behalf of the United States Land Department, that on the date the townsite of Chickasha was laid out by the Townsite Commission for the Chickasaw Nation and on the date the plats thereof were approved by the Secretary of the Interior, J. P. Ellis, was the owner of permanent, substantial and valuable improvements thereon, other than fences, tillage and temporary houses; and that Ellis sold and conveyed his improvements upon the lot to Riddle, defendant in error; and that Riddle presented the conveyance of the improvements to the Commission; and that the lot was duly scheduled to Riddle and Cooke, the latter afterwards transferring his interest to Riddle. (Trans. p. 79.)

This finding of facts was approved by the Secretary of the Interior. (Trans. pp. 86-87.) And also by the opinion of the Assistant Attorney General for the Interior Department. (Trans. pp. 877-93.) Also by the judge of the trial court in his findings of fact, wherein in approving the decision of the Land Department on the question of fact as to who owned the improvements, the trial judge said (Trans. pp. 235-238):

> "And first as to the ownership of the improvements, we believe the evidence taken in connection with the pleadings in the unlawful detainer suit, which was considered in evidence, put the question of ownership beyond the boundaries of dispute."

The finding of fact that Riddle was the owner of the improvements is further sustained and approved by the decision of the Supreme Court of Oklahoma, wherein it is said:

> "Who of the claimants owns the improvements? That the improvements on this lot met the requirement of the law is beyond dispute. Then, if the townsite commission, upon its investigation, found, as we assert, that Riddle owned the improvements and that the Johnsons owned no improvements, how can it be successfully affirmed that in awarding the lot to Riddle it fell into error of law?"

As stated above, the action was an ejectment, but the plaintiffs in error filed a cross petition,

charging that they were the owners of the improvements upon the lot, and therefore entitled to purchase it, under the provisions of the Treaty. The lot having been patented to Riddle in pursuance to the decision of the Land Department, plaintiffs in error, in their cross petition, prayed that he be held to hold the title in trust for them. The record conclusively shows that Riddle was the owner of the improvements and entitled to purchase the lot. The only claim which plaintiffs in error asserted was that they owned the improvements upon the lot, and not Riddle, and that therefore they were entitled to the lot, which had been, by the action of the land department, erroneously patented to Riddle. We invite careful consideration of the cross petition of plaintiffs in error, H. B. and E. B. Johnson, beginning at page 57 and ending, so far as its allegations are concerned, at page 65 of the record, but the exhibits thereto attached extend to page 93 of the Transcript. The alegations of this cross petition are extremely *pro lix*, relating to many matters alleged to have taken place before the adoption of the Chickasaw and Choctaw Treaty, on June 28, 1898. (30 Stat. L. 495.) But all of the allegations contained in this cross complaint are designed to show that the plaintiffs in error, or their predecessors, in

a line of conveyances, owned the improvements on the lot; and from this showing they contended that the decision of the land department in awarding and causing the lot to be patented to Riddle was erroneous; and in the trial court and Supreme Court of the State of Oklahoma plaintiffs in error endeavored to have the error which they claimed was thus committed corrected, upon the ground that the evidence showed that they were the owners of the improvements. As shown by the decision of the Supreme Court (Trans. 280-289), it was conceded that the finding of fact by the land department against the plaintiffs in error was binding upon them, but they contended that by reason of the proceedings in the unlawful detainer suit, mentioned in their cross petition, and the tenancy of Ellis, Riddle's predecessor, in a line of conveyances under Fitzpatrick, the predecessor of Johnsons in a line of conveyances, the improvements on the lot had become forfeited to Fitzpatrick, and that this forfeiture, in some indirect and mysterious way, inured to the benefit of the Johnsons. The gravamen of the claim of plaintiffs in error was that they were the owners of the improvements on the lot and therefore entitled to purchase it, and having

been deprived of this right by the decision of the land department they were entitled by the decree of the court to have Riddle held as trustee for them. But the decision was against them on that issue. We submit, however, that the decision of the Supreme Court on that issue against the plaintiff in error does not raise a federal question and that therefore the motion to dismiss the writ of error should be sustained.

The case of *Telluride Power Transmission Company* v. *Rio Grande Western Railway Company*, 175 U. S. 639, 44 L. Ed. 305, is in point. It was an action brought in the State District Court of Utah by the railway company against the Transmission Company to confirm and quiet title of the plaintiff to certain unsurveyed public lands of the United States in the State of Utah. The plaintiff in the court below alleged compliance with the laws of Congress, under which it claimed to have acquired title to the land; and that while the plaintiff was lawfully in possession of the land the defendant set up an adverse claim and by threats and force stopped its work and denied its right to use the land for railroad purposes. The defendant, the Transmission Company, in its answer denied the material allegations of the complaint, and alleged that it had taken posses-

sion, and alleged compliance with certain Acts of Congress, which authorized it to acquire title to the premises; and that defendant had been in possession of the land more than two years before the suit was brought. The plaintiff's title was sustained in the trial court and the Supreme Court of Utah affirmed the judgment. The defendant sued out a writ of error to the Supreme Court assigning, among other things, the failure of the District Court to remove the case to the Circuit Court of the United States. Mr. Justice Brown, speaking for this court, denying jurisdiction, said:

> "We think the case falls more properly within the third clause as one wherein a title or right is claimed under a statute of the United States. In such case such title or right must be 'specially set up and claimed' before judgment in the state court. In its complaint, the plaintiff railway company makes no allusion to this act, but relies upon an act of Congress respecting a right of way for railroads through public lands of the United States (18 Stat. L. 482, Chap. 152), and upon certain provisions of the local laws of Utah. The statute is not set up in the answer of the defendants, who relied upon their priority of possession. So, also, in the thirty-three assignments of error filed by the defendants in the state Supreme Court no reference is made to an Act of Congress as the basis of their right, and no intimation is made that the District Court erred in the construction or application of any such act.

"In the opinion of the Supreme Court it is stated that the errors alleged raised the questions, first, whether there was not a statutory forfeiture of the plaintiff's charter in consequence of a failure to complete and put its road in operation; second, whether plaintiff had the lawful right to locate its right of way in the canon, and had located it over the land in dispute, and was in actual possession thereof, when defendant interfered; third, whether the law required the plaintiff to file with the register of the land office a profile of its route; and fourth, whether the defendants made such appropriation, or had such possession of the land in dispute as authorized them to hold it against the plaintiff. After discussing the validity of the plaintiff's charter, the powers granted by it and the possession of the plaintiff, the opinion proceeds to consider whether the defendants had any right to the land in dispute, and in this connection finds that they might have obtained a vested right to own unappropriated waters of the Provo river for the purposes specified in their charter, and that such right is recognized and acknowledged by Rev. Stat., paragraph 2339, above cited, but professed itself 'unable to find from a preponderance of the evidence in the record that the defendants, or either of them, had appropriated the land in dispute, and that they were, or that either of them was, in actual possession of it when the plaintiff located its right of way, took actual possession and engaged in grading it. We cannot regard the plaintiff as a mere intruder on the defendant's possession nor can we hold that they had a right to prevent the plaintiff's employees from grading it and to eject plaintiff from actual possession of the land in dispute. * * *

"From this *resume* of the proceedings, it is evident that there was no denial to the defendants of any right they may have possessed by virtue of a priority of possession. The statute (Rev. Stat., paragraph 2339), provides that 'whenever, by priority of possession rights to the use of water' for certain purposes 'have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions,' the owners of such vested rights 'shall be maintained and protected in the same,' and their right of way for the construction of ditches and canals acknowledged and confirmed. But in order to establish any rights under the statute it was incumbent upon the defendants to prove *their priority of possession*, or at least to disprove *priority* on the part of the plaintiff. *The question, who had acquired the priority of possession? was not a federal question, but a pure question of fact upon which the decision of the state court was conclusive. No construction was put upon the statute; no question arose under it; but a preliminary question was to be decided before the statute became material, and that was, whether defendants were first in possession of the land. Even if priority of possession had been shown, it would still have been necessary to prove that defendant's right to the use of the water was recognized and acknowledged by the local customs, laws and decisions, all of which were questions of state law.*

"In this contention an attempt is made to distinguish between the findings of fact and the conclusions of law. Defendants concede that they are bound by the findings of fact upon the subject of possession, but that they are not bound by the conclusions of law, which

are as follows: First, that the plaintiff, prior to the commencement of the suit, had the possession, right of possession, and the inchoate title of the lands described; second, that the defendant company had no power in Utah to engage in generating electric power for sale; third, that defendants never had the title, possession, or right of possession, to the lands, or acquired any vested right in accordance with the laws or customs of the country, or any right to flow or otherwise occupy said lands, or prevent the use and occupation thereof by the plaintiff railroad company and that their adverse claim was unfounded; fourth, that the plaintiff was entitled to judgment.

"It is quite evident that these findings involved either questions of fact or questions of local law, and that while the finding of the ultimate fact of prior possession may possibly have been a legal conclusion, it was not a federal question. In this particular the case is covered by *Eilers* v. *Boatman*, 111 U. S. 356, 28 L. Ed. 454, 4 Sup. Ct. Rep. 432, which was an action for the settlement of adverse claims to mineral lands. The case turned upon the priority of location, which the court held was a matter of fact, although the court below called it a conclusion of law.

"The case under consideration in its material aspects resembles that of *Bushnell* v. *Crooke Mining & Smelting Co.*, 148 U. S. 682, 37 L. Ed. 610, 13 Sup. Ct. Rep. 771, which was an action of ejectment growing out of conflicting and interfering locations of mining claims. As stated by Mr. Justice Jackson, 'the question presented on the trial of the controversy, under the pleadings was purely one of fact and

had reference to the true direction which the Monitor lode or vein took after encountering a fault, obstruction or interruption at a point south of the discovery shaft sunk thereon * * *. After the decision had been rendered by the Supreme Court of the state a petition for rehearing was presented by the plaintiffs in error, which, for the first time, sought to present a question whether paragraph 2322 of the Revised Statute of the United States gave to the appellants 'the exclusive right of possession' and enjoyment of all other veins or lodes having their apexes within the Monitor's surface ground.' The court held it to be 'plainly manifest that neither the pleadings nor the instructions given and refused present any federal question, and an examination of the opinion of the Supreme Court affirming the action of the trial court as to instruction given, as well as its refusal to give instructions asked by the defendants below, fail to disclose the presence of any Federal question.' In this connection Mr. Justice Jackson quotes the remark of the Chief Justice in Cook *County* v. *Calumet & C. Canal & Dock Co.*, 138 U. S. 635, 653, 34 L. Ed. 1110, 11 Sup. Ct. Rep. 435: 'The validity of a statute is not drawn into question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed.' See also *Doe ex dem. Barbarie* v. *Mobile*, 9 How. 451, 13 L. Ed. 212.

"The position of the plaintiffs in error is that, as their whole case depended upon the rights asserted by them under paragraph 2339, and that as the courts decided adversely to the rights claimed by them, there was no necessity of a special reference to that statute

relying in this connection upon such cases as *Miller* v. *Nicholls*, 4 Wheat. 311, 4 L. Ed. 578; *Satterlee* v. *Matteuson*, 2 Peter 380, 410, 7 L. Ed. 458, 468, and others cited in *Columbia Water Power Company* v. *Columbia Electric Street R. Light & Power Co.*, 172 U. S. 475, 488, 43 L. Ed. 521, 526, 19 Sup. Ct. Rep. 247, in which we have held that, if it sufficiently appear from the record that the validity of a state statute was drawn in question as repugnant to the Constitution of the United States, and the question was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not in terms specially set up and claimed in the record is not conclusive against a review of the question here. But the difficulty in this case is that before it could be said that any right or title under a statute of the United States had been denied, *it was necessary to establish a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws, and decisions. These were local and not federal questions. The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of a federal question.*"

The same rule is announced again by this court in *Telluride Power Transmission Company* v. *Rio Grande Western Railway Company*, 187 U. S. 569, 47 L. Ed. 307, where, according to the second paragraph of the syllabus, it is as follows:

"Findings of fact or questions of local law

upon which depends a party's right under U. S. Rev. Stat., paragraph 2339 (U. S. Comp. Stat. 1901, p. 1437), to the protection of vested water rights, are not reviewable in the Supreme Court of the United States on writ of error to a state court."

Mr. Justice McKenna, speaking for the Court, in sustaining the motion to dismiss the writ of error to the Supreme Court of Utah, said:

"The defendant in error has moved to dismiss the case for want of jurisdiction in this court. The essential issues of fact were decided against the plaintiffs in error and the case therefore seems to be brought within the ruling in *Telluride Power Transmission Co. v. Rio Grande Western R. Co.*, 175 U. S. 639, 44 L. Ed. 305, 20 Sup. Ct. Rep. 245. The corporations in this case were parties in that case, and so were Nunn and Holbrook. The same public interests were in opposition and the power company relied for rights in Provo canon on paragraph 2339 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 1437), as the company does in this case, and the rulings on those interests and rights constituted the vital questions in that case as they do in this. It was pointed out that, 'in order to establish any rights under the statute, it was incumbent upon the defendants to prove their priority of possession, or at least to disprove priority on the part of the plaintiff.' And it was observed: 'The question who had acquired this priority of possession was not a federal question, but a pure question of fact, upon which the decision of the state court was conclusive. No construction was put upon the statute; no ques-

tion arose under it; but a preliminary question was to be decided before the statute became material, and that was whether defendants were first in possession of the land. Even if priority of possession had been shown, it would still have been necessary to prove that defendants' right to the use of the water was recognized and acknowledged by the local customs, laws, and decisions, all of which were questions of state law.'

"After discussion it was also observed: 'But the difficulty in this case is that, before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws, and decisions. These were local, and not federal questions. The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of a federal question.'"

Within the rule established by these authorities, the ownership of the improvements on the lot was the preliminary and controlling question to be determined and the decision of this question necessarily depended upon the local law.

In the case of *Udell* v. *Davidson*, 7 How. 769, it was held:

"What amounts to a trust or out of what facts a trust may spring, are not federal questions and not reviewable on a writ of error by this court."

See also *Smith* v. *Adsit*, 23 Wall. 368.

Under another view of the case the writ of error should be dismissed, and that is, that although there may be a federal question involved, still, if the decision was upon another ground, sufficient to dispose of the case, the Supreme Court is without jurisdiction. This point was decided in the case of *Lowry* v. *Silver City Gold and Silver Mining Company*, 179 U. S. 196, 45 L. Ed. 151, where it was held that a writ of error to review a decision in favor of the lessor of a mining claim against the lessees, who have attempted to make a new location, will be dismissed by the Supreme Court of the United States, when one of the grounds of the decision sufficient to dispose of the case is that the lessees are estopped to contest the right of the lessor. This court in that case said:

> "The Supreme Court of the state placed its decisions upon two grounds: First, that, although the Evening Star claim included the original discovery shaft of the Wheeler claim, it did not thereby destroy that claim in view of the fact that long prior to the location of the Evening Star the owners of the Wheeler had located a new shaft and developed the mine in that shaft. *Gwillim* v. *Donnellan*, 115 U. S. 45, 29 L. Ed. 348, 5 Sup. Ct. Rep. 1110, was held not applicable. The other ground was estoppel by virtue of the lease

under which two of the plaintiffs in error acquired possession. While the former ground is the one principally discussed in the opinion, the latter was adverted to in a few words at its close. The latter is sufficient to dispose of the case in this court. *Eustis* v. *Bowles*, 150 U. S. 361, 37 L. Ed. 1111, 14 Sup. Ct. Rep. 131. See also *DeLamar's Nevada Gold Mining Co.* v. *Nesbitt*, 177 U. S. 523, 44 L. Ed. 872, 20 Sup. Ct. Rep. 715, and cases cited in the opinion. The writ of error is dismissed."

The same rule was announced in the case of *Eustis* v. *Bowles*, 150 U. S. 361, 37 L. Ed. 1111, where according to the second paragraph of the syllabus it was held:

"Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not federal, has also been raised and decided against such party and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment."

In the body of the opinion it was held:

"It is settled law that to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision by the state court, but that its decisoin was necessary to the determination of the cause, and that it was actually decided ad-

versely to the party claiming a right under the federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. *Murdock* v. *Memphis*, 87 U. S. 20 Wall. 590 (22:429); *Cook County* v. *Calumet & C. Canal & D. Co.*, 138 U. S. 635 (34:1110).

"It is likewise settled law that where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question to sustain the judgment, this court will not review the judgment.

"In *Klinger* v. *Missouri*, 80 U. S. 13 Wall. 257, 263 (20:635, 637), this court, through Mr. Justice Bradley, said: 'The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one,

sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the federal question, and this court will then take jurisdiction.'

"In *Johnson* v. *Risk*, 137 U. S. 300, 307 (34:683, 686), the record showed that in the Supreme Court of Tennessee two grounds of defense had been urged, one of which involved the construction of the provisions of the federal Bankrupt Act of March 2, 1867, and the other the bar of the statute of limitations of the State of Tennessee; and this court held that 'where, an action pending in a state court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a *federal question, and judgment passes for the defendant, the record must show, in order to justify a writ of error from this court, that the judgment was rested upon the disposition of the federal question; and if this does not affirmatively appear, the writ of error will be dismissed, unless the defense which does not involve a federal question is so palpably unfounded that it cannot be presumed to have been entertained by the state court.*' "

In the case of the *Seaboard Air Line Railway Company* v. *Duvall*, 225 U. S. 477, 56 L. Ed. 1171, according to the second paragraph of the syllabus it was held:

"To sustain a writ of error from the Federal Supreme Court to review a judgment of the highest court of a state on the ground that

there was set up and denied a right, privilege, or immunity claimed under a federal statute, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the act so directly involved that the state court could not have given the judgment it did without deciding against the contention of the plaintiff in error."

It cannot be said that the decision of the State Supreme Court depended upon a controlling federal question. On the contrary, the decision of that court is based upon a controlling local question of law and fact, and that is the ownership of the improvements on the lot sued for.

Fourth.

If, upon an examination of the records, the court should determine that the writ of error ought not to be dismissed, then we insist that under Section 5 of Rule 6, the judgment of the Supreme Court of the State of Oklahoma should be affirmed, because "the question on which the jurisdiction of the court depends is so frivolous as not to need further argument."

ARGUMENT.

The Chickasaw and Choctaw Treaty or Act of Congress of June 28, 1898 (30 Stat. L. 495), among other things provides:

"When said towns are so laid out, each lot on which permanent, substantial and valuable improvements other than fences, tillage, and

temporary houses, have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty percentum of the appraised value of such improved property, and the remainder of such improved property at sixty-two and one-half percentum of said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall, within ten days from his purchase, pay into the treasury of the United States one-fourth of the purchase price, and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same."

Neither defendant in error nor plaintiffs in error had any rights whatever in the lot prior to the adoption of this treaty; they were both trespassers on the public domain of the Indians. The only rights either of them had were conferred by the treaty, and the right to purchase the lot was conferred on the owner of the improvements. When the lot was scheduled to Riddle, by virtue of his ownership of the improvements, for the first time he had a legal interest in the lot. The controlling circumstances which conferred legal status on his possession of the lot was the fact that he

owned the improvements. The plaintiffs in error not being the owners of the improvements, were never in position to assert any right whatever under the treaty; they had no right which could be denied them by the decision of the Supreme Court of Oklahoma. (See opinion of Oklahoma Supreme Court, Trans. pages 284-289.) Hence we submit that the claim on the part of plaintiffs in error that a federal question is presented is utterly untenable and frivolous.

Respectfully submitted,

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